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No. 72-948

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-20)[1] is reported at 464 F.2d 1313. The opinions of the Federal Communications Commission (A. 35 to 88 and A. 89 to 139) are reported at 23 F.C.C. 2d 880 and 28 F.C.C. 2d 139.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari; "A." refers to the separate printed appendix.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1972 (Pet. App. A–23 to A–24), and petitions for rehearing were denied on October 2, 1972 (Pet. App. A–21 to A–22). The petition for a writ of certiorari was filed on January 2, 1973, and was granted on May 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission has authority, under Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, to recoup a portion of its costs of administering the Federal Communications Act, 48 Stat. 1064, 47 U.S.C. 151, *et seq.*, through the imposition of annual fees on CATV systems subject to its jurisdiction after taking into consideration the benefit such companies receive from Commission regulation as well as the other criteria set forth in Title V.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act, 1952, 65 Stat. 290, 31 U.S.C. 483a, provides:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any

person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this title shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this title shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

STATEMENT

National Cable Television Association, Inc. (NCTA) seeks reversal of a court of appeals decision affirming an order of the Federal Communications

Commission under Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, imposing annual fees on cable television systems.[2] In the court of appeals NCTA contended that "the Commission lacks the authority to impose any sort of an annual fee in cable television, and that in any event this annual fee fails to meet the statutory requirements and amounts to a tax because it fails to consider the statutory element of 'value to the recipient' (*i.e.*, the CATV operators) conferred by the FCC regulation of the industry" (Pet. App. A–14 to A–15; footnote omitted). The court of appeals, however, concluded that the Commission had properly considered all the statutory elements set forth in Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, and that "under the Commission's regulatory scheme which existed from the time of the adoption of these fees until the present, CATV operators have received 'valuable benefits' sufficient to justify the imposition of the annual fee" (Pet. App. A–17). Accordingly, the court held that the annual fee was within the authority delegated to the Commission to make its work of specific benefit "self-sustaining to the full extent possible" under 31 U.S.C. 483a (Pet. App. A–19 to A–20).

A. GENERAL BACKGROUND: FCC REGULATION OF CABLE TELEVISION SYSTEMS

Cable television systems generally provide two types of services to subscribers. First, they carry the tele-

[2] Cable television systems are sometimes referred to as community antenna (CATV) systems.

vision signals of local broadcast stations, and thereby facilitate reception of local signals which might not otherwise be satisfactory. Second, they transmit to subscribers the signals of distant television stations entirely beyond the range of local antennae. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157; *United States* v. *Midwest Video Corp.*, 406 U.S. 649.

Under the Commission's 1966 CATV rules, a CATV system could not carry a distant signal into one of the 100 largest television markets without prior Commission authorization after an evidentiary hearing. 47 C.F.R. (1968) 74.1107. Carriage of any local signals as well as carriage of distant signals in smaller markets could commence 30 days after notice, provided no objection had been filed by local stations. 47 C.F.R. (1968) 74.1105(a) and (c). If such an objection was filed, the CATV service could not begin until the Commission ruled on the merits of the objection. 47 C.F.R. (1968) 74.1105(c) and 74.1109.

The Commission subsequently found the hearing requirement of the 1966 rules unduly burdensome since each distant signal carriage question had to be adjudicated on an *ad hoc* basis. Accordingly, in 1968, the Commission suspended all hearings under the 1966 rules, "and action on requests for authorizations to carry signals was deferred pending the completion of the rule making proceeding, unless carriage of the signals requested was consistent with the [newly] proposed rules." 37 Fed. Reg. 3254.

In June 1970, after further study, the Commission announced a different set of proposed rules which

would permit cable systems to carry four distant independent signals. 37 Fed. Reg. 3253. In addition, the Commission proposed to limit the franchise fees which local and state governments could assess CATV operators to 2 percent of a system's revenues. *Ibid.*

Following extensive rulemaking proceedings, the Commission adopted new cable television rules on February 12, 1972. 37 Fed. Reg. 3280. The new rules not only set forth procedures to determine what local and distant signals a cable system may carry, but also require cable operators to seek and receive a "certificate of compliance" from the Commission before commencing "operations or add[ing] a television broadcast signal to existing operations." *Ibid.*[3] While existing cable systems are not required to obtain a certificate immediately, the rules provide that "[n]o cable television system lawfully carrying television broadcast signals in a community prior to March 31, 1972, shall con-

[3] The rules now provide that all cable systems must carry, on request, the signals of all stations in their market, Grade B signals of non-commercial educational TV stations, all translator stations in the cable community with 100 watts or higher power, and all TV stations significantly viewed in the cable community. Cable systems located in the first fifty television markets may also carry on a second priority basis additional stations so as to provide three full network stations and three independent stations. On a third priority basis, the system may carry educational and non-English language stations. In addition a system may carry up to two more independent stations, provided that the number of additional signals permitted under this priority is reduced by the number of signals added under the second priority. Cable systems in the second fifty television markets are subject to similar carriage rules except that they may only carry the signals of two independent stations under the second priority. Cable systems in smaller television markets may carry additional signals so that, including signals required to be car-

tinue carriage of such signals beyond the end of its current franchise period, or March 31, 1977, whichever occurs first, unless it receives a certificate of compliance." 47 C.F.R. 76.11(b).

Under the Commission's system of federal standards to be locally implemented, cable operators must receive a franchise from the appropriate local governmental authority before a certificate can be granted. The rules (47 C.F.R. 76.31) require that the franchise contain recitations and provisions consistent with the following:

> (1) The franchising authority has approved the "franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements * * * as part of a full public proceeding affording due process;"
>
> (2) "The franchisee shall accomplish significant construction within one (1) year after receiving Commission certification," and thereafter extension of cable "to a substantial percentage of its franchise area each year * * *;"
>
> (3) "The initial franchise period shall not exceed fifteen (15) years, and any renewal franchise period shall be of reasonable duration;"
>
> (4) "The franchising authority has specified or approved the initial rates" for charges to subscribers, and "[n]o increases * * * shall be

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ried, the system will carry three full network stations and one independent station. Such systems may also carry additional educational stations and stations programming in non-English languages. Systems located outside any television market may carry any additional signals. 47 C.F.R. 76.57, 76.59, 76.61, and 76.63. Signals carried at the time the 1972 rules became effective were grandfathered. 47 C.F.R. 76.65.

made except as authorized by the franchising authority after an appropriate public proceeding affording due process;"

(5) The franchisee will maintain a local business office or agent to handle complaints from subscribers;

(6) Changes in the Commission's rules will be reflected in the franchise within one year of the change or at franchise renewal, whichever occurs first.

The new rules also limit the franchise fees that may be imposed by the localities in which the CATV stations operate (47 C.F.R. 76.31):

> The franchise fee shall be reasonable (*e.g.*, in the range of 3–5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds 3 percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of Federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program.[4]

In fulfilling its regulatory responsibilities the Commission has also taken steps to protect cable operators from unfair competition and to keep entry into the industry open. For example, in 1970, after initially ad-

[4] Existing systems are exempt from this provision for five years or until the end of their franchise period, whichever occurs first.

opting specific rules designed to protect independent CATV operators from discrimination (in favor of their own CATV affiliates) by telephone companies which control the poles on which cables are strung,[5] the Commission promulgated broader rules (47 C.F.R. 63.54–63.57 and 64.601–64.602) which "prohibit telephone companies * * * from furnishing CATV service in their telephone service areas, either directly or through affiliates, and disallow construction by them of cable facilities for independent CATV operators unless the carrier first offers to such operators the option of placing their own cables on the carriers' poles." *General Telephone Co. of Southwest* v. *United States*, 449 F.2d 846, 850 (C.A. 5) (sustaining the rules). Additionally, the Commission restricted television broadcast station and translator station ownership of CATV systems in their service area, and prohibited broadcast net-

[5] In *General Telephone Co. of Southwest* v. *United States*, 449 F.2d 846, 851 (C.A. 5), the court summarized the Commission's initial efforts: "Starting in 1966 the Commission began affirmatively to assert its control over telephone company practices with respect to CATV systems. Several complaints were filed by CATV interests alleging, inter alia, that the carriers favored their subsidiary CATV companies over the independents in a variety of ways and that independents were often required to lease channel service rather than being permitted to rent pole space. Subsequently the Commission determined that the provision of channel service by telephone companies for CATV required certification under Section 214 of the Communications Act. The granting of a certificate was to be predicated on several factors including the degree of affiliation between the telephone carrier and the CATV operator. The Commission was of the opinion that by reason of their control over utility poles or conduits, the telephone companies were in a position to preclude or substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition."

work ownership of cable systems. See *Second Report and Order, CATV,* Docket No. 18397, 23 F.C.C. 2d 816; 47 C.F.R. 76.501.

B. EARLIER COMMISSION EFFORTS TO IMPLEMENT TITLE V OF THE INDEPENDENT OFFICES APPROPRIATION ACT

In 1963, the Commission for the first time adopted rules prescribing a schedule of fees (28 Fed. Reg. 4758 and 28 Fed. Reg. 10911) pursuant to Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. 483a. This statute directs the Commission and other agencies to prescribe fees for any "work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued" by the agency. The statute provides that such fees are "to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts."

The first Commission fee schedule only "established nominal filing fees and produced fee revenues which approximated 25 percent of the Commission's annual appropriation" (A. 3). In *Aeronautical Radio, Inc.* v. *United States,* 335 F.2d 304 (C.A. 7), certiorari denied, 379 U.S. 966, the court of appeals affirmed both the validity of the Commission's action and the reasonableness of the fees adopted. The court concluded that Title V's authorization did not constitute an unconstitutional delegation of legislative power, and held that the burden of demonstrating the unreason-

ableness of the fee schedule fell upon the petitioners rather than the Commission (335 F.2d at 309):

> To sustain their contention that the schedule does not comply with the statutory guidelines as to the cost to the government, value to the recipient, and public interest served, petitioners must show us that the order assailed is unreasonable or arbitrary: we are not at liberty to interefere with the discretion of the Commission. *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232, 236-237 * * *.
>
> Petitioners erroneously imply that the Commission had the *burden* of demonstrating that it took into consideration the "direct and indirect cost to the Government," as required by § 140 [now 31 U.S.C. 483a]. The burden is on petitioner to show unfairness. * * *
>
> We think also the Commission's discussion and reasoning in its Report and Order under Safety and Special Radio Services is a complete answer to the contention that the Commission ignored the "value to the recipient" factor and did not attempt to demonstrate benefits to applicants nor relate fees to benefits. It seems quite obvious to us that in view of the number of applicants, petitioners are seeking a most unrealistic performance by the Commission and again erroneously imply that the burden is upon the Commission to justify its fee schedule.

Subsequent changes in the fee schedule generally maintained the 25 percent ratio between revenues and annual Commission appropriations. However, the Bureau of the Budget regularly urged the establishment of higher fee schedules. Similarly, in 1969 the

House Appropriations Subcommittee expressed concern about the Commission's fee schedule, stating that fee charges should be adjusted upward to make the Commission's activities more nearly self-sustaining (H. Rep. No. 91–316, 91st Cong., 1st Sess., pp. 7–8). And the conference committee on the Independent Office Appropriation Bill, 1970 (H. Conf. Rep. No. 91–649, 91st Cong., 1st Sess., p. 6) stated:

> The committee of conference is agreed that the fee structure for the Commission should be adjusted to fully support all its activities so the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency.

Accordingly, the Commission issued a Notice of Proposed Rulemaking on February 18, 1970, seeking to establish a fee schedule more fully comporting with its statutory obligation to make the agency's activities "self-sustaining to the full extent possible" (A. 1–30).[4]

C. REPORT AND ORDER PROMULGATING THE 1970 FEE SCHEDULE

On July 2, 1970, after reviewing extensive comments from interested parties, the Commission issued its Report and Order (A. 35–88) setting forth the new fee schedule. The fee schedule not only revised exist-

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[4] The chairman of a House appropriations subcommittee noted with approval the Commission's proposed increased fee schedule. Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., Part 2, p. 951.

ing fees for broadcast licensees, common carriers, and licensees in the Safety and Special Radio field, but also imposed fees for the first time upon cable television systems. The Commission noted that since *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, cable television systems "are permitted to operate only in accordance with Commission rules and regulations adopted during the past five years" (A. 41). Moreover, the Commission pointed out that regulation of this type of interstate communication service had come to constitute "a substantial portion of the Commission's responsibilities, and a major staff unit has now been given permanent status to deal with this area" (*ibid.*). It observed that while CATV operators (at that time) did not have to receive a "license" or certificate of compliance prior to commencing operation (*ibid.*):

> the rules and regulations which have been adopted affect every CATV system and, in effect, each of the more than 2,240 operating CATV systems has been given general authorization to provide this interstate communication service in accordance with applicable rules and regulations. There, therefore, appears to be no reason for distinguishing this service from other communications services which the Commission authorizes and which are now encompassed in the present fee schedule.

Consistent with the statutory mandate of Title V, the Commission first determined its direct and indirect costs for CATV regulation as reflected in its annual budget request. This figure of $1,145,400 represented

4.6 percent of the Commission's total budget request (A. 39–40). In order to produce fee revenues which would approximate the estimated expenditures, the Commission's fee schedule imposed fees for actions on applications (*i.e.*, filing fees) as well as an annual fee for each cable television system.

As an annual fee, the Commission assessed cable television operators 30 cents for each subscriber. In explaining this formula the Commission stated (A. 65):

> (i) that generally available information about the CATV industry indicates that subscription rates tend to cluster at about $5 per month or a bit higher; (ii) that 30 cents per subscriber per year thus appears to constitute in the typical case only one-half of 1 percent of CATV system gross revenues from subscription fees, if that much; (iii) that, particularly in view of the smallness of the fee, alternative formulas involving more complicated calculation to verify adequacy of the fee payment might be more precise but, under the circumstances, are unnecessary; (iv) that the Commission lacks reliable information about the operations and internal finances of CATV systems, but is currently readying new rules and procedures which will enable it to obtain such information, via annual reporting by CATV systems; and, finally, (v) that as the Commission obtains such information it will use it for periodic review of the equity of its CATV fee schedule.

The Commission recognized that this approach might "not wholly or precisely reflect 'value to the recipient'", but that "such precision or accuracy is

not required since our proposed fee schedule need only reflect some consideration of 'value to the recipient,' and our fees, in total, fall far short of the total value of Commission licenses, grants and authorizations computed by any standard" (A. 44). While the CATV fees (both annual and for applications) would then produce $1,145,000 annually, the growing cable television industry had enjoyed annual revenues of approximately $220,000,000 as early as 1968 (*ibid.*).[7] Although such revenues were obviously "the result of individual private business enterprise and effort and cannot be claimed to derive solely from the Commission's authorizations," they nonetheless served "to place in perspective the very limited extent to which the Commission has considered the [substantial] 'value to the recipient' factor in establishing the fee schedule adopted herein" (*ibid.*).

On petitions for reconsideration, the Commission made certain modifications to its fee schedule but did not alter the basic annual fees imposed on cable television operators (A. 89, 107–110).

D. THE COURT OF APPEALS' DECISION SUSTAINING THE 1970 FEE SCHEDULE

On NCTA's petition for review, the court of appeals affirmed the Commission's order. In sustaining

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[7] NCTA estimated in hearings before the Senate subcommittee considering proposed revisions of the copyright law, that cable television systems had gross revenues of $483.1 million in 1972. Supplemental Comments of National Cable Television Ass., Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee on S. 1361, 93d Cong., 1st Sess. (July 31, 1973).

the reasonableness of the fee schedule and the Commission's authority to promulgate it, the court of appeals stated that, while the CATV industry may not welcome all of the regulatory measures undertaken by the Commission, "the inquiry under 31 U.S.C. 483 (a) is not whether the regulated industry likes or agrees with all the regulations prescribed, but whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission" (Pet. App. A–17 to A–18). It held that CATV operators "have received 'valuable benefits' sufficient to justify the imposition of the annual fee" (Pet. App. A–17). The court explained that (Pet. App. A–17; footnotes omitted):

> * * * CATV operators have directly benefited from the Commission's various regulations designed to keep entry into the industry open. The Commission has also proposed rules limiting the amount of franchise fees which local governments could charge cable operators. Indeed, as the Commission points out, the entire regulation of cable television is undergoing radical change much of which clearly inures to the benefit of cable operators.

Moreover, the court observed that the Commission's extensive broadcast regulation also benefits cable operators (Pet. App. A–18):

> CATV operators in effect merchandise the broadcast signals which the Commission has authorized by its regulation. The scarcity of television outlets which exists under the Commission's regulation of the broadcast market

structure creates much of the economic value of the distant signal importation by CATV. It is therefore clear that CATV operators do receive benefits of real value from the Commission's regulation of CATV and the related broadcast media.

After reviewing the record, the court concluded that the "Commission's formulation clearly evidences consideration of the benefits to CATV systems as measured by the number of subscribers, the direct and indirect costs of the Commission's efforts to regulate the industry, and the Congressional policy that the Commission make its work of specific benefit 'self-sustaining to the full extent possible,' under 31 U.S.C. 483a" (Pet. App. A–19 to A–20). It held that the balance the Commission struck among these factors was not unreasonable or arbitrary, and expressed confidence that the Commission would revise its fee schedule if and when the fees proved unfair, unworkable or to have an adverse effect upon competition in the CATV industry (Pet. App. A–20). It therefore affirmed in all respects the Commission's Report and Order adopting the 1970 fee schedule. Petitions for rehearing were denied (Pet. App. A–21).*

* Since the decision below, the President, in his 1974 budget, proposed substantial increases for FCC cable bureau activities, including 53 new positions at a cost of approximately $710,000. Consistent with its responsibilities for continuing review of the fee schedule, the Commission published a *Notice of Proposed Rulemaking, Schedule of Fees*, 37 Fed. Reg. 28574. The notice observed that administrative costs attributable to cable regulation were expected to reach $3,000,000 or 7.3 percent of the Commission's total budget. To recover these increased costs the Commission proposed to increase the annual CATV fees from 30

SUMMARY OF ARGUMENT

In adopting its 1970 fee schedule the Commission was not only fulfilling its affirmative statutory obligation to render the agency "self-sustaining to the full extent possible," but complying with the sense of Congress that members of profitable regulated industries—rather than taxpayers—should bear the costs of regulation from which they derive substantial special benefits (A. 38). After reviewing extensive comments the Commission concluded that an annual fee based upon a formula of 30 cents per cable television subscriber would serve the statutory objectives of Title V and comply with the policy guidelines set out in Bureau of the Budget Circular No. A–25. These

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cents to 40 cents per subscriber. It estimated that this higher assessment would recover only 88 percent of the regulatory costs for CATV (*Schedule of Fees*, 38 F.C.C. 2d 587, 589–590):

"Adoption of a cable fee schedule yielding that percentage, rather than full coverage, reflects the Commission's desire to offset the unintentional inequities resulting from the cable fee schedule basically adopted in 1970 (and currently in force) under which the Commission's actual cable revenue amounted to approximately 200 percent of cable-regulation budget allocations, and its recognition that cable television, notwithstanding its bright long-run potential for service to the American people, is still in an early developmental stage during which much financial investment is required but profit margins are typically either thin or non-existent."

The Commission's proposed fees would largely recover costs through annual fees rather than actions on applications because "[t]he per-subscriber annual fee more accurately reflects the ultimate benefit to the certificate applicant of the Commission's application processing services." *Schedule of Fees*, *supra*, 38 F.C.C. 2d at 605. The Commission invited and received comments from cable operators, including petitioner NCTA. The matter is presently pending before the Commission.

guidelines specify that fees and charges should be collected to recover "the full cost to the Federal Government" for services which provide benefits to identifiable recipients "above and beyond those which accrue to the public at large."

A. Cable television operators enjoy numerous special benefits, "above and beyond those which accrue to the public at large", and which warrant fee assessments to recover regulatory costs. They benefit most fundamentally from Commission authorizations to carry television broadcast signals. Commission rules predating and post-dating the 1970 fee schedule either have required express Commission permission for signal carriage, or only allowed carriage in a manner consistent with specific guidelines. As the representative of an industry engaged in the distribution of television signals, NCTA can hardly argue that the right to carry signals does not constitute a special benefit under Title V or Bureau of the Budget Circular No. A–25.

Moreover, the benefits enjoyed by cable television operators are not limited to television signal carriage authorizations. The Commission's rules have (1) kept entry into the industry open, (2) eliminated unfair competition from telephone carriers, who had "a natural monopoly over the means required to conduct a CATV operation" and who were "in a position to pre-empt the [CATV] market" (*General Telephone Co. of Southwest* v. *United States,* 449 F. 2d 846, 856 (C.A. 5)), and (3) have limited franchise fees which local authorities may impose. Cable operators also have

benefited from Commission regulations designed to assure a healthy television industry since cable systems are dependent upon the availability of television signals.

While it is true that the Commission's activities are conducted primarily for the benefit of the public, there is nothing in the language of Title V or Bureau of the Budget Circular No. A-25 which precludes the assessment of charges where, as here, substantial special benefits accrue to members of an industry as a result of work performed by a regulatory agency. Since every governmental activity is intended primarily for the benefit of the public, NCTA's argument on this point would, in effect, render the statute virtually meaningless. Neither the language nor the legislative history of Title V justifies such a restrictive interpretation.

B. There is likewise no support in the language of Title V or its legislative history for NCTA's claim that fees can only be assessed under 31 U.S.C. 483a when they are tied to specific services directly rendered to an individual applicant, but that the cost of regulatory activities which confer benefits on the industry as a whole are irrecoverable, even when fairly prorated among its members.

The statutory requirement that in setting fees to recover the cost of its activities the agency should consider "value to the recipient" is broadly phrased, and reflects Congress's express directive that regulated industries should "to the full extent possible" bear the cost of regulation from which they derive substantial benefits. The words of the statute do not limit the agency to recovery of only the costs of work per-

formed for a particular recipient. Rather, as the court of appeals observed, "'value to the recipient' * * * also includes any '. . . service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or other similar thing of value or utility. . .'" (Pet. App. A–7, n. 6). 31 U.S.C. 483a. Moreover, the statute expressly provides that services "to or for any person (including *groups,* associations, organizations, partnerships, corporations, or businesses)" (emphasis added) should be self-sustaining. Whether the Commission processes a particular CATV operator's application or provides particular services to it during a fiscal year, each member of the industry receives special benefits resulting from the Commission's regulation of the industry as a whole. It is accordingly reasonable, and in furtherance of the statutory purpose, for members of the industry as a whole to be assessed a pro rata portion of the cost of the regulation which produces these benefits.

C. NCTA's argument that the Commission failed to consider the "value to the recipient" in its fee schedule is equally without merit. As two different circuits of the courts of appeals have observed, the Commission has wide discretion in formulating its fees. Here the Commission quite reasonably concluded that an annual charge based on the number of subscribers was the fairest and most equitable method of balancing the statutory criteria, including the "value to the recipient," *i.e.,* the benefits which the CATV operator annually receives from Commission authorizations and regulations. The record fully supports the Fifth Cir-

cuit's conclusion that the Commission's fee schedule for cable television is "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." 31 U.S.C. 483a.

ARGUMENT

THE COMMISSION ACTED WITHIN THE SCOPE OF ITS AUTHORITY AND RESPONSIBILITIES UNDER 31 U.S.C. 483a IN ESTABLISHING ANNUAL FEES FOR CABLE TELEVISION

A. CABLE TELEVISION OPERATORS RECEIVE SPECIAL BENEFITS FROM COMMISSION REGULATION WHICH WARRANT ASSESSMENT OF ANNUAL FEES TO RECOVER REGULATORY COSTS

The principal source of revenues for CATV systems is the merchandising of broadcast television signals which "they interrupt * * * and put to their own use for profit." *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 676 (Chief Justice Burger, concurring). CATV is thus a special beneficiary of the system of regulation of broadcast signals, and of the system of regulation which assures its right to carry those signals. Since the first comprehensive cable rules were adopted in 1966, the carriage of television broadcast signals by CATV operators has required Commission authorization and been subject to Commission regulation. See, generally, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, and pp. 4–5, *supra*. Although cable systems *per se* were not formally licensed under the 1966 rules, cable operators generally could not begin carriage of distant television signals without prior Commission authorization; had to seek Commission approval to carry local television signals if objections were

filed; and could continue to carry television signals only in a manner consistent with Commission rules. Thus the Commission correctly concluded that cable television systems "directly or indirectly receive what in effect is a Commission authorization tantamount to a 'license'" (A. 41).

This characterization applies with even greater force under the Commission's new cable television rules (*supra*, p. 6). These rules not only establish precise guidelines for signal carriage, but require the grant of a certificate of compliance from the Commission before a cable operator may commence operating or add new signals to an existing system. In addition, franchising by local authorities is now subject to Commission standards (see Statement, *supra*, pp. 7–8).

The question whether Commission signal carriage authorization should be specifically characterized as a benefit," "privilege," "authority," "use," "license," "certificate," "or similar thing of value" is immaterial. For, however characterized, the Commission grants each cable operator a special "benefit" within the meaning of Title V by permitting it to carry and distribute for profit broadcast television signals in competition with regulated television stations which must pay for every hour of programming they transmit.

That this special "benefit" alone is sufficient to warrant the assessment of an annual fee is confirmed by the legislative history of Title V. One of the principal agencies at which Title V was aimed was the Federal Communications Commission. Representative

Sidney Yates, a member of the House Committee on Appropriations who explained the purpose of Title V when it was before the House of Representatives, stated in part (97 Cong. Rec. 4809):

> The Federal Communications Commission grants franchises, licenses, certificates of convenience and necessity, if you will, to all broadcasting stations upon application for such licenses, franchises, and certificates. The Commission undertakes extensive hearings first in connection with a construction permit; secondly on the question as to the allocation of the position of a particular broadcaster in the spectrum of megacycles over which the Federal Communications Commission has control. That is a pretty difficult job and a complicated job, and entails extensive hearings by the Federal Communications Commission. The taxpayers pay every dollar of the charges and of the costs that go into that hearing. The companies pay nothing, other than taxes, and I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, that it should pay some of the costs of the hearings. It is perfectly proper that the franchised company make a profit, and there has been much profit making. Such companies should assume a greater share of the costs, because regulation is necessary.

While there are some differences in the manner in which CATV operators and television broadcasters

are regulated, there are basic similarities. Contrary to petitioner's allegations (Br. 29), CATV systems do "obtain their right to operate from the Commission." Without Commission authorization (since 1972 through a formal certificate of compliance) they could not carry broadcast signals. All that the CATV systems obtain from local governments is the right to set up their cables;[10] that franchise would be of little use without the Commission's authorization to carry signals on those cables subject to its regulation.

The administrative tasks involved in the issuance of certificates of compliance, and in insuring continued compliance with the Commission's CATV regulations, are substantial. As Chairman Burch recently stated during hearings on the Commission 1973–1974 budget:

> When we announced the rules, we received a large number of applications for certificates of compliance, which is the jargon for license, if that be the expression, in the cable television field. We have a considerable backlog, and when I first came to the Commission, we had a very small group called the Cable Television Task Force, which was really just that. Since that time, we have come out with rather sophisticated rules, and the budget request is for 53

[10] This was clearly stated in the colloquy between Senator Pastore and Chairman Burch, from which petitioner (Br. 28–29) has reprinted other excerpts:

"Senator PASTORE. May I ask a question? In other words, if a person applies for a franchise to a city or a state, that is only for the privilege of setting up his cables?

"Mr. BURCH. Yes, sir."

Hearing before the Subcommittee on Communications of the Senate Committee on Commerce on Community Antenna Television Problems, 92d Cong., 1st Sess., p. 87.

> positions and 40 man-years, the bulk of which will be used to process applications and to enforce our various rules and regulations in cable television. [Hearings before the Senate Committee on Appropriations on HUD, Space, Science and Veterans and Certain Other Independent Agency Appropriations, Part 2, 93d Cong., 1st Sess., p. 1329.]

While the Commission does not protect a CATV operator's right to operate "in the particular point of the spectrum," it has provided comparable regulatory protection to CATV systems. Until the Commission acted—at the behest of the CATV industry—the ability of CATV systems to operate was in serious jeopardy as a result of the control that telephone companies exercised over the means of transmitting cable signals. As the National Cable Television Association—the petitioner here—explained to the court of appeals in its brief in *General Telephone Co. of the Southwest* v. *United States, supra* (Br. 9):

> Telephone company control over CATV market entry is premised on the fact that virtually every community throughout the country, for esthetic and other reasons, allows but a single set of utility poles. The right to erect such poles is a privilege granted by the state or local authority in the public interest. Telephone companies usually control the communications space on the poles where CATV attachments are located, either through ownership of the poles or by mutual arrangement with other utility companies. Through this control over telephone poles and rights-of-way, it has a natural monopoly that carries with it enormous power to

> grant or deny access to independent entrants into the CATV business.
>
> The telephone company's power as the sole lessor of space on its poles pursuant to pole attachment agreements is clear. When this power is held in concert with the telephone company's own interest in owning CATV systems directly or through an affiliate, or as lessor of channel distribution facilities to its affiliated systems, the likelihood that the telephone company will abuse its monopoly position is greatly increased.

NCTA directed the attention of the court of appeals to the comment of the Department of Justice which pointed to "the serious danger that the existing local monopoly position of the telephone companies as communications common carriers may prevent the development of an independent CATV industry" (Br. 9, n. 11). More significantly, petitioner represented to the court of appeals that the Commission's regulation banning telephone carriers from operating CATV systems (and the decision of the court of appeals on the challenge to the validity of the regulation) "have and will have a direct impact on NCTA and its members as well as the public whom the CATV industry serves. NCTA is vitally concerned with this impact on its existence and the existence of the CATV industry as a developing and significant part in the communications of this country" (Motion to Intervene, p. 2).[11]

The Commission's activities have not stopped merely at insuring "the existence" of the CATV systems

[11] Copies of the motion to intervene and the brief filed by NCTA have been lodged with the Clerk of the Court.

which petitioner represents. The Commission has kept entry into the industry open by restricting television broadcasters' entry into the CATV business. Moreover, since CATV systems must obtain franchises from the local communities who have ultimate control over the "cables" which pass over or under public streets, the Commission has acted to protect CATV systems from exorbitant revenue-raising franchise fees. As the Commission stated (37 Fed. Reg. 3276–3277; footnote omitted):

> While we have decided against adopting a 2 percent limitation on franchise fees, we believe some provision is necessary to insure reasonableness in this respect. First, many local authorities appear to have exacted high franchise fees more for revenue-raising than for regulatory purposes. Most fees are about 5 or 6 percent, but some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy. Finally, cable systems are subject to substantial obligations under our new rules and may soon be subject to congressionally-imposed copyright payments.

The Commission explained that it was, therefore, limiting local franchise fees to a level necessary to support *only* the cost of regulatory activities (37 Fed. Reg. 3277):

> We are seeking to strike a balance that permits the achievement of Federal goals and at

the same time allows adequate revenues to defray the costs of local regulation.

* * * * *

The Commission imposes an annual fee of 30 cents per subscriber to help finance its own cable regulatory program. Assuming average annual revenues to the cable system of $60 per subscriber, the Commission's fee amounts to one-half of 1 percent of a system's gross receipts. The regulatory program to be carried out by local entities is different in scope and may vary from jurisdiction to jurisdiction. It is our judgment that maximum franchise fees should be between 3 and 5 percent of gross subscriber revenues.

Finally, the Commission stands ready to undertake further steps to protect and foster the growth of the CATV systems consistent with the public interest. As the court of appeals observed, "regulation of cable television is undergoing radical change, much of which clearly inures to the benefit of cable operators" (Pet. App. A–17).

B. THE ASSESSMENT BY THE COMMISSION OF ANNUAL FEES ON CABLE TELEVISION OPERATORS IS CONSISTENT WITH BUREAU OF THE BUDGET CIRCULAR NO. A–25

Having largely ignored both the history and language of Title V, petitioner's argument appears to rest largely on the alleged failure of the Commission to adhere to the policy directives contained in Bureau of the Budget Circular No. A–25 (A. 143). The Circular was adopted pursuant to the provision in Title V that "the head of each Federal agency is authorized by regulation (which, *in the case of agencies in the execu-*

tive branch, shall be as uniform as practicable and subject to such *policies* as the President may prescribe) to prescribe therefor such fee, charge, or price, * * * as he shall determine * * * to be fair and equitable * * *" (emphasis supplied). The Bureau of the Budget Circular, as it expressly states, was intended to "set forth some general policies for developing an equitable and uniform system of charges * * *" (A. 142).

While the Federal Communications Commission is an independent regulatory agency, and not subject to policy directives for "agencies in the executive branch," we submit that the Commission's annual assessment is, in any event, entirely in accord with the guidelines set forth in Bureau of the Budget Circular No. A–25. The Circular provides in pertinent part:

> a. *Special Services:*
>
> (1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:
>
> (a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent * * *); or
>
> (b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certifi-

> cates of necessity and convenience for airline routes * * *); or
>
> (c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate * * *) [A. 143].

The benefits we have described at pp. 22–29, *supra*, come within each of the categories set forth in the policy statement. Clearly the privilege of "exploit[ing] the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution" [11] enables the members of the CATV industry to obtain "more immediate or substantial gains or value * * * than those which accrue to the general public." This privilege not only derives from the issuance of a certificate of compliance—or the pre-1972 procedure which involved less formal authorization to carry broadcast signals, but through the various regulatory activities described above which enable CATV systems to operate without hindrance from the telephone carriers, without substantial competition from the CATV affiliates of television networks, and protected from exorbitant local franchise fees. The Commission's activities thus not only enable the CATV systems to obtain more "immediate or substantial gains or values * * * than those which accrue to the general public" (Circular Subd. a) but also ensure "business stability" (Circular Subd. b).

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[11] *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 676 (Chief Justice Burger, concurring).

Similarly, while some of the initial efforts undertaken by the Commission proved unsatisfactory both to the CATV systems and the Commission, it cannot seriously be suggested that the rules and regulations adopted by the Commission relating to the financial responsibility of CATV systems, their method of operation and the manner in which rates are to be regulated, do not contribute to assuring "public confidence in the business activity of the beneficiary" (Circular Subd. b).

Finally, although the Commission's assumption of jurisdiction over CATV systems, pursuant to the Federal Communications Act, was not at the "request" of the CATV industry (Circular Subd. c), the industry has not been reluctant to seek the Commission's assistance where necessary. Indeed, it was at the request of NCTA, the petitioner here, that the regulation barring telephone carriers from engaging in the CATV business, which was so vital to the existence of independent CATV systems, was adopted.

In sum, since compliance with any one of the three lettered subdivisions under the heading "Special Services" suffices to satisfy the standards of the Bureau of the Budget Circular, it is clear that those standards have been met here.

C. CONGRESS EMPOWERED REGULATORY AGENCIES TO MAKE THEIR PROGRAMS SELF-SUSTAINING BY IMPOSING ANNUAL AS WELL AS FILING FEES

1. Although NCTA acknowledges the Commission's authority to establish filing fees—a proposition which had been affirmed earlier in *Aeronautical Radio, Inc.*,

supra—it attempts to deny the Commission's authority to impose "annual" fees, claiming that the statute recognizes an inherent distinction between "filing" and "annual" fees. It contends (Br. 33):

> Where an application or pleading is involved, the fee is directly related to a voluntary act. Here the additional annual CATV charges, beyond the filing and application fees, arise out of no voluntary action initiated by the charged company.

In effect, according to NCTA, fees cannot be assessed under 31 U.S.C. 483a unless they are tied to specific services directly rendered to an individual applicant. The cost of regulatory activities which confer benefits on the industry as a whole, however, are irrecoverable, even when fairly pro-rated among its members.

Nothing in the statute or its legislative history supports such a restrictive interpretation. The statutory requirement that in setting fees to recover the cost of its activities the agency should consider "value to the recipient" is broadly phrased, and reflects Congress' express directive that regulated industries should "to the full extent possible" bear the cost of regulation from which they derive substantial benefits. The words of the statute do not limit the agency to recovery of only the costs of work performed for a particular recipient. Rather, as the court of appeals observed, "'value to the recipient' * * * also includes any '* * * service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or other similar thing of value or utility * * *'" (Pet. App. A–7, n. 6). 31 U.S.C. 483a.

Moreover, the statute expressly provides that services "to or for any person (including *groups*, associations, organizations, partnerships, corporations, or businesses)" (emphasis added) should be self-sustaining. Whether the Commission processes a particular CATV operator's application or provides particular services to it during a fiscal year, each member of the industry receives special benefits resulting from the Commission's regulation of the industry as a whole. It is accordingly reasonable, and in furtherance of the statutory purpose, for members of the industry as a whole to be assessed a pro rata portion of the cost of the regulation which produces these benefits.

2. NCTA argues (Br. 42–46) that the annual CATV fee is in fact an unlawful tax on gross revenues. The issue here, however, is not the label to be attached to the annual assessment, but whether Congress in fact authorized its imposition. Since petitioner does not suggest that Congress could not have expressly authorized the imposition of the annual fee at issue, the issue is merely statutory and, as we have just shown, Title V, properly interpreted, does authorize annual assessments.

The apparent purpose of the claim that the asessment is a "tax" and not a "fee" is to direct the attention of the Court to prior statements of the Commission and its Chairman which are allegedly inconsistent with its present position. There is, however, no conflict.

When imposing an initial fee on the filing of applications, the Commission observed (25 Pike and Fischer Radio Reg. 1559, 1563):

> While it may possibly be argued that the provision of Title V calling for the payment of the amounts collected in fees into the Treasury as miscellaneous receipts is descriptive of a tax, *we believe that an overall reading of Title V firmly supports the contention that the fees are not intended for the support of the government as a whole, but rather as a means of sustaining to the fullest extent feasible those agencies of the government which bestow special privileges and services upon certain individuals who may apply for those privileges and services.* [Emphasis added.]

The imposition of the annual assessments at issue here similarly is not intended for "the support of the government as a whole," but for the support of an agency whose operation and function result in substantial benefits to those who have voluntarily entered a business affected with a public interest and subject to the special benefits and obligations that devolve from Commission regulation.

Moreover, there is nothing in the statement of Chairman Burch cited by petitioner (Br. 44) which "belies its [the Commission's] conduct in imposing the CATV annual fee schedule" (Br. 43). At the hearings on the Commission's 1973–1974 budget, Senator Proxmire, having read of the lucrative nature of the CATV business as detailed in an article in the Wall Street Journal, proposed a tax which would generate far more

revenue than necessary to recoup the cost of regulating the CATV industry. He stated:[13]

> The article indicates that cable TV is a highly lucrative area. Not as lucrative, I am sure, as the AM–TV broadcasting, but mighty lucrative. They gave an indication of some of the gold prospectors who are in this, and they are the people who have been very successful in the past.
>
> What I am getting at is that what you gentlemen do when you allocate frequencies is to provide an enormous property right, just a terrific property right. It is a tough problem that you have in providing that property right. What would be the consequences—I do not know if you have thought of them or maybe some of the other Commissioners have some views on this—what would be the consequences of charging a substantial fee to the broadcasters for the right to operate, to use for general public purposes—I am not talking about enough to bring the budget up to $36.8 billion. I am talking about bringing in *revenues of hundreds of millions of dollars a year by charging for the enormous privilege that is being given not only on radio and television but now opening up on cable television.* [Emphasis added.]

It was in response to this suggestion that Chairman Burch stated:[14]

> What is involved here, clearly, is a form of taxation—and the F.C.C. has no taxing powers nor should it, in our view, have such powers.

[13] Hearings before the Senate Committee on Appropriations on HUD, Space, Science and Veterans and Certain Other Independent Agency Appropriations, *supra*, at 1332.

[14] *Id.* at 1339.

This is a matter for Congressional action alone. Should the Congress wish to explore this question further, we would of course be prepared to supply whatever additional data might be required.

D. THE COMMISSION'S ANNUAL FEES ARE "FAIR AND EQUITABLE TAKING INTO CONSIDERATION DIRECT AND INDIRECT COST TO THE GOVERNMENT, VALUE TO THE RECIPIENT, PUBLIC POLICY OR INTEREST SERVED, AND OTHER PERTINENT FACTS"

Title V requires that the fees to be paid by beneficiaries of Commission regulation "be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." The statute thus confers on the Commission a broad measure of discretion in setting fees. As the court below aptly observed (Pet. App. A-7):

> In the first instance, the weighing of these statutory factors or "whether * * * all * * * must play a quantitative share" in the judgment made, was for the Commission. *Aeronautical Radio, Inc.* v. *United States,* 335 F.2d 304, 309 (7th Cir. 1964) *citing Secretary of Agriculture* v. *Central Refining Roig Co.,* 338 U.S. 604, 611, 612 * * *.

Indeed, the burden is upon the party challenging the Commission's fee schedule to show "that the order assailed is unreasonable or arbitrary." *Aeronautical Radio, Inc.* v. *United States, supra,* 335 F.2d at 309.

NCTA apparently concedes that the Commission properly considered the "direct and indirect cost to the Government," "public policy or interest served," and all "other pertinent facts." However, NCTA

contends that in prescribing the formula for annual fees to be paid by cable television operators the Commission either failed to consider the "value to the recipient" from Commission regulation, or weighed that factor in an arbitrary way. The court of appeals properly rejected this contention, for the record shows that the Commission considered the "value to the recipient" and balanced that factor with the other statutory factors in a reasonable manner.

One of the purposes of assessing an annual fee in the first place was to reflect more accurately the "value to the recipient" from Commission authorizations. The Commission explained that (A. 4):

> * * * in addition to a continuation of the existing concept of a fee upon filing of an application seeking an authorization, the new fee schedule adopts the concept of a separate fee reflecting our consideration of the "value to the recipient" factor involved in authorizations and licenses.

NCTA argues that the number of subscribers a system enjoys may not be the best way to reflect this value. But on judicial review the question is not what is the best choice, but was the agency's choice reasonable. See, *e.g.*, *United States* v. *Allegheny-Ludlum Steel*, 406 U.S. 742, 749; *Radio Corp.* v. *United States*, 341 U.S. 412, 420. The Commission's decision reflected a reasonable choice which recognized the complexities of the problem (A. 44):

> We fully recognize that the factors we have used [such as advertising rates in the broadcast field and subscribership in the CATV field] may not wholly or precisely reflect "value to the re-

> cipient". But such precision or accuracy is not required since our proposed fee schedule need only reflect some consideration of "value to the recipient," and our fees, in total, fall far short of the total value of Commission licenses, grants and authorizations computed by any standard.

We have shown in the Statement (pp. 12–15, *supra*) that the Commission looked at total agency costs for CATV regulation; predicted costs recoverable through filing fees; and considered CATV subscription rates, and typical CATV revenues. It then concluded that an annual fee of 30 cents per subscriber would not only give recognition to the immense value of Commission authorization enjoyed by CATV systems on an annual basis (through their annual charges to subscribers), but would best serve the statutory objectives of Title V. All of these factors show "that there is sufficient relationship between the Commission's conclusions and the factual bases in the record upon which it relied to substantively support this exercise of its authority" under the statute. *United States* v. *Allegheny-Ludlum Steel, supra,* 406 U.S. at 755–756. Nothing in NCTA's contentions indicates that the Commission acted in an arbitrary or capricious manner in adopting this method of assessment. In the words of the court below (Pet. App. A–19 to A–20):

> The Commission's formulation clearly evidences consideration of the benefits to CATV systems as measured by the number of subscribers, the direct and indirect costs of the Commission's efforts to regulate the industry, and the Congressional policy that the Commission make its work of specific benefit "self-sustaining to the full extent possible," under 31

U.S.C. 483a. Considering all factors revealed by the record the balance which the Commission struck was not unreasonable or arbitrary in our opinion."[11]

E. THE FACT THAT THE COMMISSION'S PRINCIPAL GOAL IS TO SERVE THE PUBLIC INTEREST DOES NOT PRECLUDE THE IMPOSITION OF AN ASSESSMENT ON A BUSINESS WHICH DERIVES SUBSTANTIAL BENEFITS FROM COMMISSION REGULATION

Although, as we have shown, the CATV industry has substantially benefited from Commission regulation in a manner different from that of the public generally, petitioner asserts that reference to these benefits "misses the point entirely" because "[t]he regulatory history of CATV regulation has simply not been designed to 'benefit' the CATV industry as a whole * * *" (Br. 24). This contention is without substance.

The regulatory activities of the Federal Communications Commission are "designed" to serve the public interest, as set out by Congress, by "mak[ing] avail-

[11] While NCTA repeatedly cites the decision in *National Cable Television Association, Inc.* v. *Federal Communications Commission*, 479 F.2d 183 (C.A.D.C.), for the proposition that "value to the recipient" was not properly considered, the opinion in that case dealt solely with the question whether documents in the Commission's possession fell within the scope of the Freedom of Information Act, 5 U.S.C. 552. Nothing before the court in that proceeding dealt with the Commission's authority to assess CATV fees. Nor did the decision collaterally attack the earlier Fifth Circuit opinion upholding on the record before that court the Commission's rulemaking proceedings in all respects. See 479 F.2d at 185–186, n. 2.

able * * * to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service * * *." 47 U.S.C. 151. Applying this broad policy directive to the regulation of CATV systems, the Commission has observed that its "basic objective is to get cable moving so that the public may receive its benefits, and to do so without jeopardizing the basic structure of over-the-air television" (37 Fed. Reg. 3259). This reflects the Commission's finding that the "public interest is served by preserving a healthy broadcast service" (37 Fed. Reg. 3259, n. 32), and its determination to be "guided by the standard of what will best serve the public interest and not by a desire to protect any industry from the impact of new technology" (*ibid.*).

Petitioner's basic argument appears to be that because the Commission has not permitted CATV systems free reign without regard to the public interest, those systems have not benefited from the work of the Commission. This argument, we submit, "misses the point." Congress was obviously aware that the Commission's basic function in regulating the transmission and carriage of broadcast signals is to serve the public interest. But it also recognized, as we have shown, that along with the burdens which regulation entails, those persons who are granted the privilege of carrying or transmitting broadcast signals derive substantial benefits and that—in the words of Representative Yates—it is unfair that the "taxpayers pay

every dollar of the charges and costs" involved in regulating a recipient's use of this highly profitable privilege.

While the Court of Appeals for the District of Columbia Circuit has held that "[t]here is something fundamentally wrong in assessing charges on the basis of benefit to the company when the [Federal Power] Commission must benefit the public" (*New England Power Company* v. *Federal Power Commission*, 467 F. 2d 425, 429, pending on writ of certiorari, No. 72-1162), that policy assessment—upon which the court refused to sustain the validity of the fees at issue in that case—has no proper place in the construction of Title V. For, as was stated in the brief filed by the Solicitor General on behalf of the Federal Power Commission in *Federal Power Commission* v. *New England Power Company*, No. 72-1162, pp. 21-25, every regulatory agency and every program enacted into law by Congress is intended principally to serve the public interest. If the fact that the public is the principally intended beneficiary of a particular program is sufficient to defeat an assessment under Title V, then the statute could virtually never be successfully invoked (except, perhaps, by showing that a program was not achieving its intended effect of benefiting the public interest[16]) and the congressional goal, ex-

[16] But, as Judge Tuttle observed for the court in the *General Telephone Co.* case, *supra*, 449 F. 2d at 859, "[t]he wisdom or expediency of a given law or regulation is not open to question in the courts."

pressed in the Act, that work performed by federal agencies be "self-sustaining to the full extent possible," would be defeated."

The proper standard, as suggested by Bureau of the Budget Circular A–25, is whether there are "identifiable recipient[s]" of "special benefits * * * above and beyond those which accrue to the public at large * * *" (A. 143). This is the standard which the court of appeals correctly applied in the present case in ruling that "the inquiry under 31 U.S.C. 483a is * * * whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission" (Pet. App. A–17 to A–18).

Under that standard, the Commission's annual assessments properly implement Title V and are consistent with the language and history of the statute and with the Bureau of the Budget Circular.

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[11] The degree to which the general public might benefit from a particular government service is not cited in Title V as a factor bearing on whether a charge can be assessed against persons who receive special benefit from the service. The language of the Act indicates, instead, that special beneficiaries should be charged for all such services toward the end of making them self-sustaining. The only reference in the statute to the degree of public benefit comes later when "public policy or interest served" is listed as a factor to be considered in determining the fairness of the fee to be charged for particular services.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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